

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS MERCK, individually and as a
representative of the Class,

Plaintiff,

v.

WALMART, INC.,

Defendant.

NO. 2:20-cv-02908

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

Thomas Merck, by and through his attorneys, on behalf of himself and the Class set forth below, brings the following Class Action Complaint against Walmart, Inc. ("Defendant" or "Walmart").

PRELIMINARY STATEMENT

1. This consumer class action is brought under the Fair Credit Reporting Act ("FCRA") against a company that routinely and systematically violates the FCRA's basic protections by failing to provide applicants and employees with a full copy of their consumer reports prior to taking adverse action against them, as required by 15 U.S.C. § 1681b(b)(3).

2. Because Walmart's practices have been routine and systematic, Plaintiff asserts claims for damages on behalf of himself and a Class of similarly situated individuals against whom Walmart took adverse action prior to providing them with a full and accurate copy of their consumer reports.

THE PARTIES

1 employment context, and therefore defined the term “consumer reports” to explicitly include
 2 background reports procured for employment purposes. *See* 15 U.S.C. § 1681a(d)(1)(B).

3 10. The FCRA requires that any person who uses a report for employment purposes
 4 must:

5 before taking any adverse action based in whole or in part on the
 6 report . . . provide to the consumer to whom the report relates –

7 (a) a copy of the report; and

8 (b) a description in writing of the rights of the consumer under this
 9 subchapter, as prescribed by the [Consumer Financial Protection]
 10 Bureau under section 1681g(c)(3). 15 U.S.C. § 1681b(b)(3).

11 11. The FCRA defines adverse action as “a denial of employment or any other
 12 decision for employment purposes that adversely affects any current or prospective employee”
 13 and/or as “any action taken or determination that is . . . adverse to the interests of the
 14 consumer.” *See* 15 U.S.C. §§ 1681a(k)(1)(B)(ii), 1681a(k)(1)(B)(iv)(II).

15 12. This pre-adverse action notification provision protects applicants and employees
 16 by “provid[ing] the consumer with knowledge of information the [consumer reporting agency]
 17 has reported about him or her that is going to result in adverse action in an employment
 18 context, affording the individual an opportunity to respond to it.” FTC Advisory Opinion to
 19 Leathers (Sept. 9, 1998), available at 1998 WL 34323725; *see also Moore v. Rite Aid Hdqtrs.*
 20 *Corp.*, No. 13-cv-1515, 2015 WL 3444227, at *4 (E.D. Pa. May 29, 2015) (citing *Goode v.*
 21 *LexisNexis Risk & Info. Analytics Grp., Inc.*, 848 F. Supp. 2d 532, 537 (E.D. Pa. 2012)) (“Section
 22 1681b(b)(3)(A) thus requires an employer to provide job applicants with their background
 report, summary of rights, and a ‘real opportunity’ to contest the contents of the background
 report before the employer relies on the report to take an adverse action against the

1 applicant.”). This requirement is particularly important “where the information contained in
2 the report (such as a criminal record) would automatically disqualify the individual from
3 employment,” so that the consumer has a chance to address the information “in case the
4 report is inaccurate.” FTC Advisory Opinion to Rosen (June 9, 1998), available at 1998 WL
5 34323763; *Long v. Se. Pennsylvania Transportation Auth.*, 903 F.3d 312, 319 (3d Cir. 2018).

6 13. Many other provisions of the FCRA are also notice provisions. *See* 15 U.S.C. §
7 1681b(4)(B) (notification of national security investigation); § 1681c(h) (notification of address
8 discrepancy); § 1681d(a) (disclosure of investigative report); § 1681g (full file disclosure to
9 consumers); § 1681k(a)(1) (disclosure regarding the use of public record information); § 1681h
10 (form and conditions of disclosure); § 1681m(a) (notice of adverse action).

11 14. Like the other notice provisions in the FCRA, the pre-adverse action notice
12 provision puts consumers on notice of specifically the information that is being reported about
13 them to their employer or prospective employer and allows consumers to dispute that
14 information before adverse action is taken against them.

15 15. As discussed below, Walmart routinely violated the FCRA, and consumers’ rights,
16 by failing to provide the required copy of the report before taking adverse action against
17 consumers.
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1 16. Failure to provide a copy of the report relied upon in taking an adverse
 2 employment action is an injury in fact, because failure to provide the statutorily-mandated
 3 disclosure harms the precise concrete interest that Congress sought to protect and creates a
 4 risk of real harm. *See Long v. Se. Pennsylvania Transportation Auth.*, 903 F.3d 312, 323 (3d Cir.
 5 2018); *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016).

6 **FACTUAL BACKGROUND RELATING TO PLAINTIFF AND DEFENDANT'S STANDARD PRACTICES**

7 17. In May of 2016, Plaintiff applied for work at Walmart. The yearly salary for the
 8 position for which Plaintiff applied was under \$75,000.

9 18. On or around May 27, 2016, non-party Sterling Infosystems ("Sterling") furnished
 10 a background report on Plaintiff to his prospective employer. Sterling is a consumer reporting
 11 agency that sells employment background reports to employers.

12 19. Plaintiff's report and the reports of other Class members were not procured in
 13 connection with any investigation of suspected misconduct relating to employment, or
 14 compliance with federal, state, or local laws and regulations, the rules of a self-regulatory
 15 organization, or any suspected violation of preexisting written policies of the employer.

16 20. Sterling also sells employers a service relating to when an employer notifies
 17 Sterling that the employer intends to take adverse action against an applicant based on
 18 information in the applicant's background report. Pursuant to this service, Sterling sends a
 19 letter to the applicant along with a copy of the report on which the employer relied. In short,
 20 Sterling offers to act as the employer's agent in fulfilling the employer's obligation to provide
 21 pre-adverse action notice as required by the FCRA.
 22

1 21. The report Sterling sent to Walmart contained a code that indicated Sterling
2 believed that Plaintiff had a criminal record that he did not disclose on his job application (the
3 “Code”).

4 22. The presence of the Code on Plaintiff’s report was *the* reason Plaintiff’s
5 application to Walmart was not successful.

6 23. On June 6, 2016, Walmart, through its agent Sterling, sent Plaintiff a purported
7 pre-adverse action notice, which is attached as Exhibit 1. This purported pre-adverse action
8 notice attached a report, which is included here as Exhibit 2.

9 24. The report attached to the purported pre-adverse action notice, however, was
10 not the full report Walmart used to evaluate Plaintiff for employment.

11 25. The report that Sterling sent to Walmart and the report on which Walmart based
12 its decision not to hire Plaintiff both contained the Code.

13 26. The Code, however, was not present on the version of the report attached to the
14 pre-adverse action notice that was sent to Plaintiff.

15 27. The Code and other information missing from Plaintiff’s report caused Plaintiff
16 harm. Walmart’s defective pre-adverse action notice denied Plaintiff the key information he
17 needed to know – why his application for employment was being denied.

18 28. Plaintiff was not aware of the deficiencies in Walmart’s pre-adverse action notice
19 until discovery in a related case, *Gambles v. Sterling Infosystems*, S.D.N.Y. Case No. 1:15-cv-
20 09746, brought the full report to light. Plaintiff became aware of the deficiency during a
21 deposition taken on March 15, 2019, so this claim is timely pursuant to 15 U.S.C. § 1681p
22 (statute of limitations is five years from date of violation or two years from date of Plaintiff’s

1 discovery of violation, whichever occurs first).

2 29. Plaintiff experienced a concrete injury in the form of being deprived of the actual
3 report that Walmart used to make its employment decision. Plaintiff was therefore being
4 deprived of an opportunity to rectify the perceived deficiencies in his employment application.

5 30. Walmart easily could have monitored Sterling's fulfillment of its obligations to
6 ensure that Walmart's obligations were properly fulfilled.

7 31. But Walmart failed to do so. Walmart did not adequately supervise or oversee
8 Sterling's administration of the pre-adverse action notice that Walmart was obligated to
9 provide in accordance with the FCRA.

10 32. In violation of 15 U.S.C. § 1681b(b)(3)(A), Walmart took adverse action against
11 Plaintiff, and other Class members, based on undisclosed consumer report information, without
12 first providing Plaintiff and other Class members with a copy of the pertinent consumer reports.

13 **CLASS ACTION ALLEGATIONS**

14 Plaintiff asserts his pre-adverse action notice claim on behalf of the Class defined as
15 follows:

16 All individuals against whom Defendant took adverse action based in
17 whole or in part on information contained in a consumer report
18 where the consumer report provided with Defendant's pre-adverse
19 action omitted information contained in the report on which
20 Defendant relied, within the five years predating the filing of this
21 Complaint and continuing through the date the class list is prepared.

22 33. Identifiability: The Class can be identified. Walmart's job application is web-
based, and the data entered therein is likely easily exportable and can be filtered by date.
Further, Walmart knows who it terminated or otherwise took adverse action against based on
information contained in a consumer report. Walmart maintains access to copies of reports it

1 received from Sterling and Sterling is able to determine the contents of reports included with
2 the pre-adverse action notice letters it sent on Walmart's behalf.

3 34. Numerosity: The Class is so numerous that joinder of all Class members is
4 impracticable. On information and belief, the class consists of well over 100 members.

5 35. Commonality: Common questions of law and fact exist as to all members of the
6 Class and predominate over any questions solely affecting individual members, including but
7 not limited to:

8 a) Whether Walmart uses consumer reports for employment purposes;

9 b) Whether Walmart violated the FCRA by taking adverse actions on the
10 basis of information in consumer reports, without first furnishing copies of the reports on which
11 it relied to the affected persons;

12 c) Whether Walmart was on notice of the pre-adverse action notice
13 requirements of the FCRA;

14 d) Whether Walmart's violations of the FCRA were negligent, knowing,
15 and/or willful;

16 e) The proper measure of statutory damages; and

17 f) The proper measure of punitive damages.

18 36. Typicality: Plaintiff's claims are typical of the members of the Class. It is typical
19 for Walmart to procure consumer reports for employment purposes, and Walmart typically
20 takes adverse action against employees and applicants without first providing a copy of the
21 relevant consumer report. The FCRA violations suffered by Plaintiff are typical of those suffered
22 by other Class members, and Walmart treated Plaintiff consistently with other Class members

1 in accordance with its standard policies and practices.

2 37. Adequacy: Plaintiff is a member of the Class and will fairly and adequately
3 protect the interests of the Class. Further, Plaintiff has retained counsel experienced in complex
4 class action litigation generally and in FCRA litigation in particular.

5 38. This case is maintainable as a class action under Rule 23 because prosecution of
6 actions by or against individual members of the Class would result in inconsistent or varying
7 adjudications and create the risk of incompatible standards of conduct for Walmart. Further,
8 adjudication of each individual Class member's claim as a separate action could prospectively
9 be dispositive of the interest of other individuals not a party to such action, impeding their
10 ability to protect their interests.

11 39. Class certification is also appropriate under Rule 23 because questions of law and
12 fact common to the Class predominate over any questions affecting only individual members of
13 the Class, and because a class action is superior to other available methods for the fair and
14 efficient adjudication of this litigation. Walmart's conduct described in this Complaint stems
15 from common and uniform policies and practices, resulting in common violations of the FCRA.
16 Class certification also will obviate the need for unduly duplicative litigation that might result in
17 inconsistent judgments concerning Walmart's practices. Moreover, management of this action
18 as a class action will not present any likely difficulties. In the interests of justice and judicial
19 efficiency, it would be desirable to concentrate the litigation of all Class members' claims in a
20 single forum.

1 report and a summary of his or her rights; and

2 (d) By adopting such a policy, Walmart voluntarily ran a risk of violating the law
3 substantially greater than the risk associated with a reading that was merely careless.

4 45. Plaintiff and the Class are entitled to statutory damages of not less than \$100
5 and not more than \$1,000 for each and every one of these violations, pursuant to 15 U.S.C. §
6 1681n(a)(1)(A). Plaintiff and the Class members are also entitled to punitive damages for these
7 violations, pursuant to 15 U.S.C. § 1681n(a)(2). Plaintiff and the Class members are further
8 entitled to recover their costs and attorneys' fees, pursuant to 15 U.S.C. § 1681n(a)(3).

9 **PRAYER FOR RELIEF**

10 46. WHEREFORE, Plaintiff, on behalf of himself and the Class, prays for relief as
11 follows:

- 12 a) determining that this action may proceed as a class action under Rule 23;
- 13 b) designating Plaintiff as representative for the Class and designating Plaintiff's
14 counsel as counsel for the Class;
- 15 c) issuing proper notice to the Class at Walmart's expense;
- 16 d) declaring that Walmart committed multiple, separate violations of the FCRA;
- 17 e) declaring that Walmart acted willfully, in deliberate or reckless disregard of
18 Plaintiff's rights and its obligations under the FCRA;
- 19 f) awarding actual statutory and punitive damages as provided by the FCRA;
- 20 g) awarding reasonable attorneys' fees and costs as provided by the FCRA; and
- 21 h) granting further relief, in law or equity, as this Court may deem appropriate and
22 just as provided by the FCRA.

DEMAND FOR A JURY TRIAL

Plaintiff demands a trial by jury.

RESPECTFULLY SUBMITTED AND DATED this 3rd day of June, 2020.

MEYER WILSON

By: /s/ Michael J. Boyle, Jr.

Michael J. Boyle, Jr. (0091162)
Matthew R. Wilson (0072925)
1320 Dublin Road, Suite 100
Columbus, Ohio 43215
Telephone: (614) 705-0951
Facsimile: (614) 224-6066
Email: mboyle@meyerwilson.com
Email: mwilson@meyerwilson.com

Beth E. Terrell (*pro hac vice* to be filed)
Erika L. Nusser (*pro hac vice* to be filed)
TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 319-5450
Email: bterrell@terrellmarshall.com
Email: enusser@terrellmarshall.com

E. Michelle Drake (*pro hac vice* to be filed)
Joseph C. Hashmall (*pro hac vice* to be filed)
BERGER MONTAGUE PC
43 S.E. Main Street, Suite 505
Minneapolis, MN 55414
Telephone: (612) 594-5999
Email: emdrake@bm.net
Email: jhashmall@bm.net